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NO. 89-45

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

STATE OF HAWAII,

Petitioner,

vs.

HAILA DIANE ROMAN,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court deny the petition for certiorari because it was filed late, in violation of Supreme Court Rule 20.1?

2. Was the Hawaii Supreme Court's ruling supported by an independent and adequate state constitutional ground, thus precluding any need for review by this Court?

3. Was Mrs. Roman subjected to custodial questioning prior to being formally placed under arrest?

4. Was Mrs. Roman given adequate Miranda warnings for the post-polygraph test questioning, considering the particular facts of her case?

TABLE OF CONTENTS

QUESTIONS PRESENTED . . . . . (i)

TABLE OF CONTENTS . . . . . (ii)

TABLE OF AUTHORITIES . . . . . (iv)

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

ARGUMENT AGAINST GRANTING A WRIT OF CERTIORARI 10

I. THE PETITION FOR A WRIT OF CERTIORARI WAS FILED LATE, IN VIOLATION OF SUPREME COURT RULE 20.1 10

II. THE HAWAII SUPREME COURT'S RULING WAS SUPPORTED BY AN INDEPENDENT AND ADEQUATE STATE CONSTITUTIONAL GROUND, THUS PRECLUDING ANY NEED FOR REVIEW BY THIS COURT 12

III. MRS. ROMAN WAS SUBJECTED TO CUSTODIAL QUESTIONING PRIOR TO BEING PLACED UNDER FORMAL ARREST 20

A. The Facts of This Case Demonstrate That Mrs. Roman Was Custodially Questioned Prior to Her Formal Arrest 20

B. The Hawaii Supreme Court Did Not "Rely Exclusively Upon The Notion That Miranda's Requirements Are Triggered Simply By The Fact That A Suspect Becomes the Central Focus of a Separate Criminal Investigation" 23

C. Roman's Custodial Questioning Determination Does Not Conflict With This Court's Prior Decisions . . . 24

IV. MRS. ROMAN WAS NOT GIVEN ADEQUATE MIRANDA WARNINGS FOR THE POST-POLYGRAPH TEST QUESTIONING, CONSIDERING THE PARTICULAR FACTS OF HER CASE 29

A. The Hawaii Supreme Court Properly Ruled That The Pre-Test Warnings Were Inadequate For The Post-Test Interrogation On the Particular Facts of Mrs. Roman's Case 29

B. The Roman Ruling On The Inadequacy of The Miranda Warnings Does Not Conflict With This Court's Prior Decisions 32

CONCLUSION 37

TABLE OF AUTHORITIES

CASES	PAGES
Ayres v. Polsdorfer 187 U.S. 585 (1903)	14
Beckwith v. United States 425 U.S. 341 (1976)	18, 19, 27
Berkemer v. McCarty 468 U.S. 420 (1984)	28, 29
Bonin v. Gulf Co. 198 U.S. 115 (1905)	14
California v. Beheler 463 U.S. 1121 (1983)	21, 26
Colorado v. Spring 479 U.S. 564 (1987)	19, 20, 35, 36
Duckworth v. Eagen 492 U.S. --, 106 L.Ed.2d 166 (1989)	37, 38
Edwards v. Arizona 451 U.S. 477 (1981)	29
Fox Film Corp. v. Muller 296 U.S. 207 (1935)	21
Harris v. New York 401 U.S. 222 (1971)	18
Maryland v. Garrison 480 U.S. 79 (1987)	14, 20
Michigan v. Chesternutt 486 U.S. 567, 108 S.Ct. 1975 (1988)	27, 28
Michigan v. Long 463 U.S. 1032 (1983)	19, 21
Miranda v. Arizona 384 U.S. 436 (1966)	21, 24, 31, 33, 34

TABLE OF AUTHORITIES (continued)

CASES	PAGES
Oregon v. Elstad 470 U.S. 298 (1985)	28
Oregon v. Mathiason 429 U.S. 492 (1977)	18, 19, 27
Orozco v. Texas 394 U.S. 324 (1969)	22
Partington v. Gedan 880 F.2d 116 (9th Cir. 1989)	26
Pennsylvania v. Bruder 488 U.S. --, 102 L.Ed.2d 172 (1988)	28, 29
Quinn v. Millsap 491 U.S. --, 105 L.Ed.2d 74 (1989)	20
Rhode Island v. Innis 446 U.S. 291 (1980)	25
Robinson v. Ariyoshi 854 F.2d 1189 (9th Cir. 1988)	26
Rust Land and Lumber Co. v. Jackson 250 U.S. 71 (1919)	14
State v. Amorin 61 Haw. 356, 604 P.2d 45 (1979)	16
State v. Grahovac 52 Haw. 527, 480 P.2d 148 (1971)	20, 21
State v. Ikaika 67 Haw. 563, 698 P.2d 281 (1985)	16
State v. Kaahuanui 69 Haw. --, 747 P.2d 1276 (1987)	17, 18
State v. Kaluna 55 Haw. 361, 520 P.2d 51 (1974)	15

TABLE OF AUTHORITIES (continued)

CASES	PAGES
State v. Maluia 56 Haw. 428, 539 P.2d 1200 (1975)	17
State v. Manzo 58 Haw. 440, 573 P.2d 945 (1977)	15
State v. Miyasaki 62 Haw. 269, 614 P.2d 915 (1980)	14, 15
State v. Nelson 69 Haw. --, 748 P.2d 365 (1987)	17
State v. Patterson 57 Haw. 357, 581 P.2d 752 (1978)	18, 19
State v. Ramones 69 Haw. --, 744 P.2d 514 (1987)	17
State v. Russo 67 Haw. 126, 681 P.2d 553 (1984)	15, 16, 18
State v. Santiago 53 Haw. 254, 492 P.2d 657 (1971)	14, 15, 16, 17, 18
State v. Uganiza 68 Haw. 28, 702 P.2d 1352 (1985)	16
United States v. Bayer 331 U.S. 532 (1947)	20
United States v. Lee 699 F.2d 466 (9th Cir. 1982)	24
United States ex rel. Coy v. United States 316 U.S. 342 (1942)	14
Wyrick v. Fields 459 U.S. 42 (1982)	19, 20, 33, 34, 35

TABLE OF AUTHORITIES (continued)

CONSTITUTIONAL PROVISIONS	PAGES
U.S. Const., Amend. V	12, 32, 33, 34
Hawaii Const., Art. I, Section 10	9, 12, 13, 14
RULES	
Supreme Court Rule 20.1	9, 10, 37
Supreme Court Rule 20.3	10
Supreme Court Rule 20.4	10
STATUTES	
28 U.S.C. Section 2101	10
Hawaii Revised Statutes, Section 710-1015	9
TREATISES	
W. La Fave & J. Israel, Criminal Procedure (1984)	20

OPINIONS BELOW

Respondent concurs with Petitioner's statement of the opinions below.

JURISDICTION

Respondent concurs that the judgment of the Hawaii Supreme Court is final and that the petition for a writ of certiorari was filed on July 10, 1989. However, Respondent argues that the petition was filed late in violation of Supreme Court Rule 20.1 (Section I of "Argument," infra), and that the Hawaii Supreme Court's decision rested on an independent and adequate state ground, precluding any need for review by this Court (Section II of "Argument," infra). Thus, this Court should decline to exercise jurisdiction in the instant case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent concurs with the constitutional and statutory provisions set forth by Petitioner, but contends that Article I, Section 10 of the Hawaii Constitution presented an independent and adequate state ground for the Hawaii Supreme Court's decision. Article I, Section 10 states in pertinent part: "[N]or shall any person be compelled in any criminal case to be a witness against oneself."

STATEMENT OF THE CASE

On January 5, 1987, Mrs. Haila Roman reported to the Honolulu Police Department that she had been repeatedly raped by two male prison guards while serving a prison sentence. [Petition, Appendix B at 16] Mrs. Roman's sentence required her to serve weekends at the prison over a six-month period, beginning in

October, 1986. [Id.] An immediate police investigation was commenced by Detective Leighton Fujinaka following Mrs. Roman's report. [Id.]

During the course of this investigation, Detective Fujinaka discovered discrepancies in Mrs. Roman's various descriptions of the separate rape incidents she had reported. [Id. at 17] Thinking that perhaps Mrs. Roman was lying about having been raped, Detective Fujinaka decided to give Mrs. Roman a polygraph test to confirm the truthfulness of her allegations. [Id.] Detective Fujinaka testified that he only gave polygraph examinations to rape complainants when he found discrepancies in a complainant's statement or in the evidence he gathered. [Petition, Appendix I at 128]

Pursuant to Detective Fujinaka's decision, the police requested that Mrs. Roman take a polygraph test at the main station of the Honolulu Police Department. [Petition, Appendix B at 17] She agreed to do so. [Id.] The polygraph test was administered on January 15, 1987, by Detective John Paekukui. [Id.] Detective Paekukui was a qualified and experienced police polygrapher, whose police duties had consisted solely of polygraph examinations for the preceding four years. [Id.] Detective Paekukui had assisted Detective Fujinaka in his investigation of Mrs. Roman's complaint, and he was aware of Detective Fujinaka's suspicions that Mrs. Roman was not telling the truth about being repeatedly raped. [Id.] Detective Fujinaka had told Detective Paekukui about "discrepancies" and "inconsistencies" in Mrs. Roman's statements.

[Petition, Appendix H at 101-02, Appendix I at 133] Additionally, Detective Paekukui concluded that Mrs. Roman's pre-test interview contained at least one inconsistency and that a drawing made for him by Mrs. Roman was possibly inconsistent. [Petition, Appendix H at 102]

Before conducting the polygraph examination, Detective Paekukui discussed the test with Mrs. Roman, talking with her about the questions which he intended to use, and the manner in which the test would be given. [Petition, Appendix B at 17] Detective Paekukui gave Mrs. Roman a warning about her constitutional rights, and presented her with a printed form entitled "WARNING PERSONS TAKING A POLYGRAPH EXAMINATION OF THEIR CONSTITUTIONAL RIGHTS." [Id.] Near the top of the form was a sentence reading "I am going to ask you questions about [SEXUAL ASSAULT] which occurred on or about [JANUARY 2, 1987] at [WOMENS FACILITY]," with the sections in brackets filled in by hand in ink on the pre-printed form. [Id. at 18] Below that language was a recitation of constitutional rights, including a warning that "Any statement you make may be used in court." [Id.] The form did not inform Mrs. Roman that such statements could be used against her in court. [Petition, Appendix F at 65] The form also did not inform Mrs. Roman that she would be questioned after the polygraph examination; by its own language, the form only covered "consent to be examined on the polygraph" and consent to release the results "to the person or persons concerned." [Id. at 65-66] Mrs. Roman signed the form. [Petition, Appendix B at 18]

Detective Paekukui also presented Mrs. Roman with a pre-printed form entitled "PERSONAL DATA OF SUBJECT." [Id.] The upper portion of the form was filled in with biographical information about Mrs. Roman; the lower portion of the form was occupied by a section entitled "WAIVER," which stated, inter alia, that the person taking the polygraph examination understood that "the results will be given to me at the end of the examination." [Id.] Mrs. Roman signed this form. [Id.] However, this form did not inform Mrs. Roman that her statements could be used against her or that she would be questioned after the polygraph examination; by its own language, it was limited strictly to the polygraph examination. [Petition, Appendix G at 82]

Detective Paekukui emphasized to Mrs. Roman that she should tell the truth during the polygraph test. [Petition, Appendix B at 18] However, he did not inform her that she would be questioned after the polygraph examination, that she herself could be charged with a crime, or that statements she made could be used against her. [Petition, Appendix H at 104-105, 115, Appendix I at 139, 152] Yet, Detective Paekukui testified that if Mrs. Roman failed the polygraph test he intended to follow-up on the polygraph test and question Mrs. Roman. [Petition, Appendix H at 105] Detective Paekukui agreed that "the polygrapher gets the confession after the exam." [Id. at 103] He told his subjects that if they lied the test would certainly detect it. [Id. at 106] He knew it was important that his subjects felt that the test would work and that they had a stake in the outcome. [Id. at 107] If

a polygraph test indicated deception, he employed the psychological technique of telling the subject that she clearly and certainly had failed the test, in order to get the subject to open up and tell him what he desired to know. [Id.]

The polygraph examination took about one hour and fifteen minutes. [Id. at 95] Mrs. Roman's responses during the examination indicated to Detective Paekukui that she was not being truthful about the alleged rapes. [Petition, Appendix B at 18] Following the test, Detective Paekukui reviewed the polygraph examination charts for a couple of minutes in Mrs. Roman's presence. [Petition, Appendix B at 18, Appendix H at 105] He then informed her of his conclusion that she had not been telling the truth during the test. [Petition, Appendix B at 18] Detective Paekukui testified that by telling Mrs. Roman that she was not being truthful, he was in effect telling her that she had "lied on some of the questions." [Petition, Appendix H at 116] As "part of the technique" of interrogating Mrs. Roman, Detective Paekukui conveyed to her "in no uncertain terms" that she failed the test. [Id. at 117] However, he still did not inform her that she was a suspect for a false reporting offense or that her responses could be used as evidence against her in such a case, even though in at least one previous case the police "had to arrest a person for false reporting" after the person "admitted lying on a test like this." [Id. at 107, 109]

When Detective Paekukui informed Mrs. Roman of his conclusion, she initially insisted that she had told the truth

about the sexual assaults. [Petition, Appendix B at 18] Detective Paekukui then questioned Mrs. Roman about the discrepancies between the polygraph test and her statements for about five minutes. [Id. at 18-19] Mrs. Roman testified that Detective Paekukui specifically stated to her that "you are not being truthful." [Petition, Appendix I at 140] She testified that she told Detective Paekukui that she wanted to go home, but that he replied, "Not till we get to the bottom of this." [Id.] Mrs. Roman felt that she had to stay at the police station "until he heard what he wanted to hear." [Id. at 141] She testified that Detective Paekukui stood by the door for about five minutes, insisted that she was "lying," and was "quite arrogant," "very authoritative," "intimidating" and "almost mean in his tone." [Id.at 141-42]

At one point Detective Paekukui observed that Mrs. Roman appeared to be carrying a "heavy burden"; he urged her to unburden herself to him. [Petition, Appendix B at 19] Detective Paekukui told Mrs. Roman that if she did so it would "probably make her feel better instead of feeling this burden." [Petition, Appendix H at 96] Mrs. Roman then said: "Sit down, there's something I want to tell you." [Petition, Appendix B at 19] Mrs. Roman stated to Detective Paekukui that she had fabricated her reports of being sexually assaulted while a prisoner. [Id.] Mrs. Roman testified that she made this statement just so the questioning would be over and she could go home. [Petition, Appendix I at 142] She thought that Detective Paekukui was not going to believe her no matter how long she told him she was not lying, so she said anything that he

wanted to hear. [Id.] She believed that if she retracted the rape charges the prison guards would not harass her and she would not have to remain in protective custody. [Id. at 142-43]

Detective Paekukui brought Detective Fujinaka to the polygraph room. [Petition, Appendix B at 19] Detective Paekukui told Detective Fujinaka that Mrs. Roman had failed the polygraph test and that Mrs. Roman had admitted that she made up the rape charges. [Petition, Appendix I at 144] Detective Paekukui told Mrs. Roman to tell Detective Fujinaka what she had told him. [Petition, Appendix B at 19] Mrs. Roman then repeated to Detective Fujinaka her earlier statement to Detective Paekukui. [Id.] Before she was instructed to tell Detective Fujinaka what she had earlier told Detective Paekukui, Mrs. Roman was not informed of her right to remain silent. [Id.]

Detective Paekukui "relinquished custody" of Mrs. Roman to Detective Fujinaka. [Petition, Appendix H at 99] Detective Fujinaka then took Mrs. Roman to a different interrogation room about fifty yards away from the first room. [Petition, Appendix B at 19, Appendix H at 99] He instructed Mrs. Roman to write down what she had told him and Detective Paekukui. [Petition, Appendix B at 19][1] He provided Mrs. Roman with blank HPD-252 forms and she

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[1] Petitioner claims to this Court that Detective Fujinaka asked Mrs. Roman if she would be willing to write out a statement. [Petition at 7] However, the trial court explicitly found that Mrs. Roman was instructed by Detective Fujinaka to write the statement. [Petition, Appendix B at 19] This finding of fact was quoted and accepted by Petitioner in its brief before the Hawaii Supreme Court. [Petition, Appendix C at 33]

began to write out her statement. [Id.] Mrs. Roman testified that she was told to "fill out the form exactly the way I had told Detective Paekukui and Detective Fujinaka in the polygraph room," and she thought that she "had no choice" in the matter. [Petition, Appendix I at 145]

While Mrs. Roman was writing her statement, Detective Fujinaka informed his superior officer, Lt. James Neely, about her admission. [Petition, Appendix B at 19] After receiving Detective Fujinaka's report, Lt. Neely instructed Detective Fujinaka to arrest Mrs. Roman and charge her with the crime of False Reporting to Law Enforcement Authorities. [Id.] Lt. Neely also instructed Detective Fujinaka to make a tape recording of Mrs. Roman's statement. [Id.] Detective Fujinaka testified that "at that point I should have warned her of her constitutional rights. But I did not." [Petition, Appendix I at 133]

Detective Fujinaka returned to the room where Mrs. Roman was writing her statement. [Petition, Appendix B at 20] He testified that at that point she was under arrest. [Petition, Appendix I at 131] He produced a tape recorder and instructed Mrs. Roman to read her statement aloud so that it could be tape recorded. [Petition, Appendix B at 20] After the statement was read into the tape recorder, it was signed both by Mrs. Roman and Detective Fujinaka. [Id.] At no time was Mrs. Roman informed of her right to remain silent by Detective Fujinaka. [Id.] Fifteen minutes after signing the written statement, Mrs. Roman was placed under formal arrest by Detective Fujinaka for False Reporting to

Law Enforcement Authorities, a violation of Hawaii Revised Statutes, Section 710-1015.

ARGUMENT AGAINST GRANTING THE WRIT OF CERTIORARI

I. THE PETITION FOR A WRIT OF CERTIORARI WAS FILED LATE, IN VIOLATION OF SUPREME COURT RULE 20.1.

Subsection (d) of 28 U.S.C. Section 2101 states: "The time of appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court." Rule 20.1 of the Rules of the Supreme Court states: "A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort . . . shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment." [Emphasis added.][2]

The opinion of the Hawaii Supreme Court in the instant case was filed on April 11, 1989 [Petition, Appendix A], and the Judgment on Appeal was entered on April 25, 1989. [Petition, Appendix C][3] Yet the Petition for a Writ of Certiorari was not filed until July 10, 1989, well after the 60-day period for filing the petition had expired. Supreme Court Rule 20.3 mandates that

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[2] Rule 20.1 provides that a "Justice of this Court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding 30 days." However, no such extension of time was sought or granted in this case. Rule 20.4 extends the time for filing a petition for a writ of certiorari if a petition for rehearing was filed with the state supreme court. However, no petition for rehearing was filed with the Hawaii Supreme Court in this case.

[3] Petitioner has mistakenly labeled two of the appendices to its Petition as "Appendix C." The Judgment on Appeal is the first of these appendices.

the "Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time." This Court refuses to entertain untimely filed petitions. E.g., United States ex rel. Coy v. United States, 316 U.S. 342, 346 (1942); Rust Land and Lumber Co. v. Jackson, 250 U.S. 71, 76 (1919); Bonin v. Gulf Co., 198 U.S. 115, 118 (1905); Ayres v. Polsdorfer, 187 U.S. 585, 595-96 (1903). Thus, the instant petition should be summarily denied.

II. THE HAWAII SUPREME COURT'S RULING WAS SUPPORTED BY AN INDEPENDENT AND ADEQUATE STATE CONSTITUTIONAL GROUND, THUS PRECLUDING ANY NEED FOR REVIEW BY THIS COURT.

Article I, Section 10 of the Hawaii Constitution, the state version of the federal constitutional guaranty against self-incrimination, has not been "'construed in pari materia with the [Fifth] Amendment.'" [Petition at 20 (brackets in original) (quoting Maryland v. Garrison, 480 U.S. 79, 83-84 (1987))]. Rather, the Hawaii Supreme Court has exhibited a "willingness to extend protections that 'have an independent source in the Hawaii Constitution's privilege against self-incrimination' beyond the minimum prescribed by the United States Supreme Court." State v. Miyasaki, 62 Haw. 269, 280, 614 P.2d 915 (1980) (quoting in part State v. Santiago, 53 Haw. 254, 265-66, 492 P.2d 657 (1971)).

The Hawaii Supreme Court has "not hesitated to 'extend the protections of the Hawaii Bill of Rights beyond those of the textually parallel provisions in the Federal Bill of Rights when logic and sound regard for the purposes of those protections have so warranted.'" Id. (quoting in part State v. Kaluna, 55 Haw. 361, 369, 520 P.2d 51 (1974)). The Hawaii Supreme Court views federal interpretations of the federal constitution "with reference to the wisdom of adapting these interpretations for our state." Id. (quoting State v. Manzo, 58 Haw. 440, 452, 573 P.2d 945 (1977)). See State v. Miyasaki, 62 Haw. at 280-85 (Hawaii Constitution's privilege against self-incrimination demands transactional immunity, not just use and derivative use immunity); State v.

Santiago, 53 Haw. 254, 265-67, 492 P.2d 657 (1971) (Hawaii Constitution's privilege against self-incrimination demands that statement elicited in violation of Miranda cannot be used by State even for impeachment purposes on cross-examination or in rebuttal).

The Hawaii Supreme Court's rulings on Miranda issues have not "been entirely consistent with subsequent decisions of the [United States] Supreme Court expounding Miranda." State v. Russo, 67 Haw. 126, 133, 681 P.2d 553 (1984). "Consequently, when claims of Miranda violations are advanced, we [the Hawaii Supreme Court] are constrained to seek primary guidance from precepts enumerated in the seminal decision, which have been incorporated into Article I, [section 10] of our [Hawaii] constitution, and our own [Hawaii] cases . . . ." Id. Both the Respondent's trial court suppression motion and appellate brief to the Hawaii Supreme Court urged suppression of Mrs. Roman's statements because, inter alia, Petitioner violated Article I, Section 10 of the Hawaii Constitution. Although the Hawaii Supreme Court's opinion in Roman does not explicitly base its ruling upon the Hawaii Constitution, the cases it cites in discussing its ruling demonstrate that its decision was adequately and independently grounded upon the Hawaii Constitution.

The Hawaii Supreme Court's discussion of the custodial interrogation issue cited, inter alia, its decisions in State v. Russo, 67 Haw. 126, 681 P.2d 553 (1984) (quoted supra); State v. Ikaika, 67 Haw. 563, 698 P.2d 281 (1985); State v. Amorin, 61 Haw. 356, 604 P.2d 45 (1979); and State v. Uganiza, 68 Haw. 28, 702 P.2d

1352 (1985). In all of these cases, the Hawaii Supreme Court specifically cited the self-incrimination provision of the Hawaii Constitution. State v. Amorin is especially important, because the Hawaii Supreme Court in Roman cited Amorin as the sole authority in support of the key conclusion that: "What had originally been a relatively innocuous interview [of Mrs. Roman] had turned into a custodial interrogation requiring Miranda warnings." [Petition, Appendix A at 11] In Amorin, the Hawaii Supreme Court twice stated that Petitioner had violated Article I, Section 10 of the Hawaii Constitution, see 61 Haw. at 357, 363, and stressed that "the 'protections enumerated in Miranda have an independent source in the Hawaii Constitution's privilege against self-incrimination.'" 61 Haw. at 359 n.3 (quoting State v. Santiago, 53 Haw. 254, 266, 492 P.2d 657 (1971)).

Similarly, the Hawaii Supreme Court's discussion of the inadequacy of the Miranda warnings in Roman cited, inter alia, its decisions in State v. Maluia, 56 Haw. 428, 539 P.2d 1200 (1975); State v. Ramones, 69 Haw. --, 744 P.2d 514 (1987); State v. Nelson, 69 Haw. --, 748 P.2d 365 (1987); and State v. Kaahanui, 69 Haw. --, 747 P.2d 1276 (1987). In all of these cases the Hawaii Supreme Court cited the self-incrimination provision of the Hawaii Constitution.

State v. Nelson and State v. Kaahanui are especially important. The Hawaii Supreme Court cited Nelson in its Roman opinion as the sole authority in support of the key point that: "Because Roman was not informed about the totally separate false

charges problem . . . the earlier Miranda warnings (relating solely to the polygraph examination) were inadequate, so rewarnings specifically pertaining to the subsequent interrogation were mandated." [Petition, Appendix A at 13] In Nelson, the Hawaii Supreme Court stressed that "'the protections which the United States Supreme Court enumerated in Miranda have an independent source in the Hawaii Constitution's privilege against self-incrimination,'" 748 P.2d at 369 (quoting State v. Santiago, 53 Haw. at 266), and emphasized that the "Hawaii rule is broader in scope than the federal rule." Id.

The Hawaii Supreme Court cited Kaahanui in its Roman opinion as the sole authority in support of the point that: "Where the prosecution has not proven that the accused [Mrs. Roman] was properly admonished about her constitutional rights, there could be no valid waiver." [Petition, Appendix A at 13] In Kaahanui, the Hawaii Supreme Court again emphasized that "'the protections which the United States Supreme Court enumerated in Miranda have an independent source in the Hawaii Constitution's privilege against self-incrimination.'" 747 P.2d at 1279 (quoting State v. Santiago, 53 Haw. at 266). The Hawaii Supreme Court further pointed out in Kaahanui that it follows "the same high standards in enforcing the 'Miranda' rights that 'have an independent source in the Hawaii Constitution's privilege against self-incrimination.'" Id. (quoting in part Santiago, 53 Haw. at 266).

Petitioner notes that the Hawaii Supreme Court cited Miranda in the Roman opinion [Petition at 20], but this fails to

demonstrate that the decision was not independently and adequately predicated on the Hawaii Constitution. As the Hawaii Supreme Court specifically explained in State v. Russo, the "seminal decision," Miranda, has been incorporated into the Hawaii Constitution, but the court has chosen to chart its own course in determining whether to apply to the Hawaii Constitution subsequent federal case law interpreting Miranda. State v. Russo, 67 Haw. 126, 133, 681 P.2d 553 (1984). See State v. Santiago, 53 Haw. at 261-67 (Hawaii Supreme Court follows Miranda but refuses to apply subsequent case of Harris v. New York, 401 U.S. 222 (1971), to Hawaii Constitution).

Petitioner claims that the Roman decision's determination on the issue of custodial interrogation rested upon the discussion of federal case law in State v. Patterson, 57 Haw. 357, 361, 581 P.2d 752 (1978), and particularly this Court's decisions in Beckwith v. United States, 425 U.S. 341 (1976), and Oregon v. Mathiason, 429 U.S. 492 (1977). [Petition at 11, 19] Yet, curiously enough, the Patterson, Beckwith and Mathiason cases were never cited in the Roman opinion; were never cited in Petitioner's opening and reply briefs and in Respondent's answering brief in the Hawaii Supreme Court; were never cited in the trial court's suppression order; and were never cited in Petitioner's and Respondent's memoranda in the trial court. Thus, Petitioner's contention is completely unfounded.

Petitioner also claims that because the Hawaii Supreme Court distinguished the facts of the Roman case from Colorado v.

Spring, 479 U.S. 564 (1987), and Wyrick v. Fields, 459 U.S. 42 (1982), the decision did not rest upon an independent and adequate state ground. [Petition at 20] Yet merely distinguishing two federal cases on their facts does not translate into exclusive reliance upon federal constitutional law. The Hawaii Supreme Court can indicate how its decision does not clash with federal law while still relying on an adequate and independent state ground.

The case authority cited by Petitioner on this issue is clearly distinguishable. In Michigan v. Long, 463 U.S. 1032 (1983), relied upon by Petitioner [Petition at 19-20], this Court emphasized that: "Not a single state case was cited to support the state court's holding that the search of the passenger compartment was unconstitutional. Indeed, the [state supreme] court decided that the search in this case was unconstitutional because 'the [state] court of appeals erroneously applied the principles of Terry v. Ohio . . . to the search of the interior of the vehicle in this case.'" Id. at 1043-44 (emphasis added; ellipsis in original). In the Roman opinion, by contrast, the Hawaii Supreme Court cited no less than eighteen Hawaii cases. The only federal authority cited was 1) Miranda, which, as discussed supra, has been expressly incorporated into the Hawaii Constitution by the Hawaii Supreme Court, 2) Colorado v. Spring and Wyrick v. Fields, which, as discussed supra, were cited only to distinguish them on their facts, and 3) United States v. Bayer, 331 U.S. 532 (1947), which was cited (in tandem with a Hawaii case) in support of applying the "cat out of the bag" doctrine, an issue not raised in the petition

for certiorari.

In Quinn v. Millsap, 491 U.S. --, 105 L.Ed.2d 74 (1989), relied upon by Petitioner [Petition at 19], the state supreme court "relied exclusively on its interpretation of the Equal Protection Clause" of the Fourteenth Amendment. 105 L.Ed.2d at 84 (emphasis added). As this Court held, "the judgment of the Missouri Supreme Court rests solely on its belief that 'the Equal Protection Clause has no relevancy' to this case." Id. at 85 (emphasis added).

In Maryland v. Garrison, 480 U.S. 79 (1987), relied upon by Petitioner [Petition at 20], this Court found that "the [state court] opinion indicates that the Maryland constitutional provision is construed in pari materia with the Fourth Amendment." Id. at 83-84. By contrast, as thoroughly discussed supra, the Hawaii Supreme Court has always felt "free to go beyond these requisites [United States Supreme Court decisions] in protecting one's right of silence under the State Constitution." State v. Grahovac, 52 Haw. 527, 533, 480 P.2d 148 (1971).

In sum, "[r]espect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." Michigan v. Long, 463 U.S. 1032, 1040 (1983). This Court has "long recognized that 'where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.'" Id. at 1038

n.4 (quoting Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935)). The Roman case presents an independent and adequate non-federal ground and thus is not appropriate for this Court's review.

III. MRS. ROMAN WAS SUBJECTED TO CUSTODIAL QUESTIONING PRIOR TO BEING PLACED UNDER FORMAL ARREST.

A. The Facts of This Case Demonstrate That Mrs. Roman Was Custodially Questioned Prior to Her Formal Arrest.

Custodial questioning is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. 436, 444 (1966) (emphasis added); accord California v. Beheler, 463 U.S. 1121, 1123 (1983). This determination is to be made by objectively appraising the totality of the circumstances. 1 W. La Fave & J. Israel, Criminal Procedure Section 6.6, at 493 (1984). Some of these circumstances are the place of the interrogation, the length of the interrogation, the nature of the questions asked, the conduct of the police, and whether the defendant was being questioned as a suspect or as a witness. Id.

Petitioner argues that Mrs. Roman was not in custody or otherwise deprived of her freedom of action in any significant way prior to the point at which she was explicitly told that she would be placed under arrest. [Petition at 14][4] As discussed below, Petitioner's argument is patently incorrect.

Mrs. Roman was placed inside the inherently intimidating setting of a polygraph examination room at the main police station.

[4] Respondent notes that in Petitioner's brief to the Hawaii Supreme Court, however, Petitioner conceded that Mrs. Roman was in custody for Miranda purposes "after [she] retracted her story with Detective Paekukui . . . ." [Petition, Appendix C at 32 n.5]

These were "unfamiliar surroundings" and an "unfamiliar atmosphere." Miranda, 384 U.S. at 450, 457. Cf. Orozco v. Texas, 394 U.S. 324 (1969) (custodial interrogation can occur even at defendant's own home). Mrs. Roman was alone in this room at the police station, except for the presence of the police detective questioning her. Miranda, 384 U.S. at 449 ("the principal psychological factor contributing to a successful interrogation is privacy -- being alone with the person under interrogation") (emphasis in original).

Mrs. Roman had already been through a police-conducted polygraph examination lasting one hour and fifteen minutes by the time Detective Paekukui began the post-examination questioning. [Petition, Appendix H at 95] It was obvious from the questions asked and the fact that she had been requested to take a lie detector test that the police suspected that she was lying. It was not Detective Fujinaka's standard practice to give lie detector examinations to rape complainants; he testified that he only did so when discrepancies appeared in their statements and/or other evidence. [Petition, Appendix I at 128]

Detective Paekukui testified that after he reviewed the test results and found that Mrs. Roman had failed the lie detector test, he told her that she was not telling the truth, that she was "carrying a heavy burden" and "that if she would tell the truth it would probably make her feel better instead of feeling this burden." [Petition, Appendix H at 96, 108] He testified that he had to question her for several minutes prior to her initial

incriminating statement. [Id. at 109]

Detective Paekukui had concluded that Mrs. Roman's pre-test interview contained at least one inconsistency and that a drawing she made for him was possibly inconsistent. [Id. at 102] Additionally, "a prompt medical examination [of Mrs. Roman] failed to disclose any evidence of physical assault consistent with rape or any medical evidence of rape" and "Detective Fujinaka discovered discrepancies in [Mrs. Roman's] various descriptions of the separate rape incidents she had reported." [Petition, Appendix B at 16-17] In view of the foregoing, no reasonable person in Mrs. Roman's position would have felt free to just stand up and walk out of the police station. Although Mrs. Roman was not yet under formal arrest, formal arrest is not a condition precedent to custodial interrogation. United States v. Lee, 699 F.2d 466, 468 (9th Cir. 1982). By the time Mrs. Roman began to make her initial incriminating statement, she was definitely "deprived of [her] freedom of action in [a] significant way." Miranda v. Arizona, 384 U.S. at 444. Thus, Mrs. Roman's initial incriminating statement occurred during custodial interrogation.

Petitioner itself conceded in the Hawaii Supreme Court that Miranda warnings were necessary after Mrs. Roman stated to Detective Paekukui that she had falsely reported the rapes. [Petition, Appendix C at 32 n.5] After Mrs. Roman's admission had been first repeated to Detective Fujinaka, Detective Paekukui "relinquished custody" of Mrs. Roman to Detective Fujinaka. [Petition, Appendix H at 99] Thus, it is obvious that Mrs. Roman

was in custody at the time of her subsequent written and taped statements.

B. The Hawaii Supreme Court Did Not "Rely Exclusively Upon The Notion That Miranda's Requirements Are Triggered Simply By The Fact That a Suspect Becomes The Central Focus Of A Separate Criminal Investigation."

Petitioner incorrectly argues that "the Supreme Court of Hawaii relied exclusively upon the notion . . . that Miranda's requirements are triggered simply by the fact that a suspect becomes 'the central focus of a separate criminal investigation.'" [Petition at 12-13] Actually, however, the Hawaii Supreme Court recognized the validity of Mrs. Roman's much more comprehensive argument "that the inherently coercive, intimidating situation forced her to admit to the fabrication and amounted to custodial interrogation." [Petition, Appendix A (Hawaii Supreme Court's opinion) at 10] The Hawaii Supreme Court painstakingly reviewed the underlying facts of the Roman case that supported this argument. [Id. at 5-9] The Hawaii Supreme Court correctly applied the well-established standard that "Miranda warnings must precede any police questioning which subjugates an individual to the will of the examiner and thereby undermines the privilege against self-incrimination." [Id. at 10] See Rhode Island v. Innis, 446 U.S. 291, 299 (1980); Miranda, 384 U.S. at 457-58.

The Roman opinion does mention the fact that after the polygraph examination the investigation focused on Mrs. Roman. [Id. at 11] However, Petitioner takes this point out of context and emphasizes it to the exclusion of the entire remainder of the

court's discussion. Read in the context of the entire opinion, it is clear that the Hawaii Supreme Court merely used the fact that the "investigation focused on [Mrs.] Roman" as one of many factors demonstrating that the police questioning had "subjugate[d] [Mrs. Roman] to the will of the examiner and thereby undermine[d] the privilege against self-incrimination." The Hawaii Supreme Court also relied upon specific additional facts to support this determination: "Detective Paekukui informed [Mrs. Roman] of his conclusion [that she was lying]"; "Detective Paekukui then questioned [Mrs. Roman] about the discrepancies between the polygraph test and her statements for about five minutes"; "At one point Detective Paekukui observed that [Mrs. Roman] appeared to be carrying a 'heavy burden' [and] he urged her to unburden herself to him"; "the questioning by Detective Paekukui (and later Detective Fujinaka) became specific as to her misconduct"; and "they were essentially asking [Mrs.] Roman to confess to the false reporting offense." [Id. at 11 (emphasis in original)]

C. Roman's Custodial Questioning Determination Does Not Conflict With This Court's Prior Decisions.

Petitioner contends that the custodial questioning determination in Roman conflicts with this Court's prior decisions. [Petition at 12-15] As discussed below, this assertion is unfounded.[5]

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[5] Steven Michaels, the Deputy Attorney General representing the State of Hawaii in this case, has recently had difficulty interpreting the scope and applicability of case authority. In Robinson v. Ariyoshi, 854 F.2d 1189 (9th Cir. 1988), the Ninth Circuit reprimanded counsel for the State of Hawaii, which included

In California v. Beheler, 463 U.S. 1121 (1983) [Petition at 13-14], the "interview lasted less than 30 minutes" and afterwards "Beheler was permitted to return to his home." Id. at 1122 (emphasis added). As this Court found: "Indeed, Beheler's freedom was not restricted in any way whatsoever." Id. at 1123.

In Oregon v. Mathiason, 429 U.S. 492 (1977) [Petition at 13], the interview was conducted only "about two blocks from defendant's apartment." Id. at 493. The defendant confessed "within five minutes after [he] had come to the office." Id. (emphasis added). Rather than being arrested after the confession, "he was released to go about his job and return to his family" and "did in fact leave the police station without hindrance." Id. at 494-95.

In Beckwith v. United States, 425 U.S. 341 (1976) [Petition at 13], the agents questioned the defendant "at the dining room table" of "a private home where [he] occasionally stayed," id. at 342-43, instead of in a polygraph examination room

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Mr. Michaels, for "abuse of precedent that can, with charity, be excused only by assuming that counsel do not know when they have crossed the line separating zealous representation from misstatement of the law." Id. at 1190. The court cited Disciplinary Rule 7-102(A)(5) of the Model Code of Professional Responsibility, "prohibiting a lawyer from knowingly making a false statement of law," and mentioned the possibility of a hearing concerning sanctions. Id. In Partington v. Gedan, 880 F.2d 116 (9th Cir. 1989), the Ninth Circuit criticized the parties represented by the State of Hawaii, whose counsel included Mr. Michaels, for filing a meritless motion for costs and attorneys' fees. Id. at 130-31. The Ninth Circuit denied this motion and ordered the parties represented by Mr. Michaels to pay the costs and attorneys' fees incurred by the opposition in responding to the meritless motion. Id. at 131.

at a police station as in Mrs. Roman's case. In Beckwith, there was at least one other person present at the home. Id. at 342. The defendant conceded "that the agents did not 'press' him on any question he could not or chose not to answer," id. at 343, in contrast to Mrs. Roman's experience of being accused of not telling the truth, being told that she was carrying a heavy burden, and being urged to unburden herself. After making his statements to the agents, instead of being arrested like Mrs. Roman, the defendant in Beckwith drove by himself to his place of employment, where he later met the agents and voluntarily provided books and records to them. Id. at 344.

Michigan v. Chesternutt, 486 U.S. 567, 108 S.Ct. 1975 (1988) [Petition at 13], involved not the issue of custodial interrogation under Miranda, but rather the issue of whether the defendant was "seized" under the Fourth Amendment. This Court held that when a police car "drove alongside [the defendant] for a short distance," 108 S.Ct. at 1977, and when there was no evidence that the police communicated to the defendant in any way that they wished to "block [defendant's] course or otherwise control the direction or speed of [defendant's] movement," id. at 1980, the defendant had not been seized under the Fourth Amendment. Michigan v. Chesternutt obviously has no application to the completely distinct facts of Mrs. Roman's case.

Oregon v. Elstad, 470 U.S. 298 (1985) [Petition at 13], did not concern any issue of whether the defendant was custodially interrogated. The State of Oregon conceded that Elstad was in

custody at the time of his statements. Oregon v. Elstad concerned the issue of whether an incriminating response made at a time when the defendant had not been given his Miranda warnings should result in suppression of the defendant's subsequent confession, given after he had received and waived his rights. That issue is not germane to the issues raised in the instant petition for certiorari.

In Berkemer v. McCarty, 468 U.S. 420 (1984) [Petition at 13], and Pennsylvania v. Bruder, 488 U.S. --, 102 L.Ed.2d 172 (1988) [Petition at 14], this Court held Miranda inapplicable to routine roadside questioning of motorists during brief traffic stops. This Court emphasized that such stops are "temporary and brief," with "the vast majority" lasting "only a few minutes." Berkemer v. McCarty, 468 U.S. at 437; see Pennsylvania v. Bruder, 102 L.Ed.2d at 176. This Court stressed that brief traffic stops are thus "quite different from stationhouse interrogation, which [as in Mrs. Roman's case] frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek." Berkemer, 468 U.S. at 438 (emphasis added); see Bruder, 102 L.Ed.2d at 176. This Court also emphasized that traffic stops are usually open to the public view of pedestrians and other motorists, further reducing police intimidation and distinguishing such stops from stationhouse interrogation. Berkemer, 468 U.S. at 438-39; see Bruder, 102 L.Ed.2d at 176. Thus, the prolonged, incommunicado stationhouse interrogation of Mrs. Roman can hardly be compared to a brief,

routine roadside traffic stop.

In sum, there was no error in the Hawaii Supreme Court's determination that Mrs. Roman was custodially interrogated prior to the point at which she was placed under formal arrest. The Hawaii Supreme Court did not rely exclusively on a "focus of the investigation" test, and its holding did not conflict with the decisions of this Court cited by Petitioner.

IV. MRS. ROMAN WAS NOT GIVEN ADEQUATE MIRANDA WARNINGS FOR THE POST-POLYGRAPH TEST QUESTIONING, CONSIDERING THE PARTICULAR FACTS OF HER CASE.

A. The Hawaii Supreme Court Properly Ruled That The Pre-Test Warnings Were Inadequate For The Post-Test Interrogation On the Particular Facts of Mrs. Roman's Case.

To be valid, a Miranda rights waiver must be a "knowing and intelligent relinquishment or abandonment of a known right or privilege." Edwards v. Arizona, 451 U.S. 477, 482 (1981) (emphasis added). The facts of Mrs. Roman's case well demonstrate that the Miranda warnings given to Mrs. Roman prior to the polygraph examination could not support a valid waiver for the post-examination interrogation.

At the time that Mrs. Roman was given her pre-polygraph examination Miranda warnings, the police believed that the test would very likely show deception and that Detective Paekukui would thus be questioning Mrs. Roman after the test. A prompt medical examination had failed to disclose any evidence of rape or physical assault [Petition, Appendix B at 16], and Detective Fujinaka had found discrepancies in Mrs. Roman's statements. [Id. at 17] Detective Fujinaka had told Detective Paekukui about the "discrepancies" and "inconsistencies" in Mrs. Roman's statements. [Petition, Appendix H at 101-02, Appendix I at 133] Detective Paekukui concluded that Mrs. Roman's pre-test interview contained at least one inconsistency and that a drawing she made for him was possibly inconsistent. [Petition, Appendix H at 102]

Detective Paekukui testified that if Mrs. Roman's

polygraph test showed deception he intended to follow-up on the test and question Mrs. Roman. [Id. at 105] Detective Paekukui was an experienced police polygraph examiner, who knew that "the polygrapher gets the confession after the exam." [Id. at 103] Prior to giving a polygraph test he would convince the subject that the test would certainly detect deception. [Id. at 106-07] Then, when a polygraph test indicated deception, he employed the psychological technique of telling the subject that she clearly and certainly had failed the test, in order to get the subject to open up and tell him what he desired to know. [Id. at 107]

Even though Detective Paekukui knew that he very likely would be questioning Mrs. Roman after the polygraph test, he withheld this information from her. Rather, he gave her Miranda rights waiver forms that related solely and exclusively to the polygraph examination and the announcement of the test results [Petition, Appendix G at 80-82], thus affirmatively creating the false impression that he was not going to question Mrs. Roman after the polygraph examination.

In addition to relating only to the polygraph examination and the announcement of the results, the Miranda rights waiver forms did not inform Mrs. Roman that her statements could be used against her. One of the forms stated that her statements could be used in court [id. at 80]; but because Mrs. Roman was a complainant in a rape case, not a suspect in a false reporting case, at the time she signed the form, this vague provision did not notify her that her statements could be used against her in court. Yet this

Court's Miranda decision explicitly holds:

> The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege but also of the consequences of foregoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege.

Miranda v. Arizona, 384 U.S. at 469 (emphasis added).

After the polygraph examination, Detective Paekukui confronted Mrs. Roman with the test results. He told her that the results showed deception [Petition, Appendix B at 18, Appendix H at 116-17], stated that she seemed to be carrying a heavy burden [Petition, Appendix B at 19], and urged her to unburden herself to him with the inducement that this would make her feel better. [Id.; Appendix H at 96]. Detective Paekukui began to question Mrs. Roman without properly informing her of her Miranda rights, even though Mrs. Roman was now obviously the suspect in a false reporting case instead of the complainant in a rape case. Mrs. Roman still had not been informed that any statements she made could be used against her, as explicitly required by this Court's Miranda decision. Yet, Detective Paekukui testified that in at least one prior case, his police department had arrested a person who had failed the polygraph test for false reporting. [Petition, Appendix H at 107, 109]

After Mrs. Roman made incriminating statements, Detective Paekukui contacted Detective Fujinaka and told Mrs. Roman to repeat

the statements to Detective Fujinaka [Petition, Appendix B at 19], still not properly informing her of her Miranda rights. [Id.] Detective Fujinaka obtained written and taped statements from Mrs. Roman. Even though Detective Fujinaka's supervisor instructed Detective Fujinaka to formally arrest Mrs. Roman while she was writing her written statement [id.], Detective Fujinaka still did not properly inform Mrs. Roman of her Miranda rights. [Id. at 20] Rather, he instructed Mrs. Roman to make a tape recording of her statement. [Id.]

In view of the foregoing, it is clear that Mrs. Roman was not adequately informed of her Miranda rights. One cannot waive rights that she has not been properly informed that she holds. "[A]ny evidence that the accused was . . . tricked . . . into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." Miranda v. Arizona, 384 U.S. at 476.

B. The Roman Ruling On the Inadequacy of The Miranda Warnings Does Not Conflict With This Court's Prior Decisions.

The cases decided by this Court that are cited by the Petitioner do not conflict with the instant decision on the inadequacy of the warnings given to Mrs. Roman. All of Petitioner's cited cases are readily distinguishable.

In Wyrick v. Fields, 459 U.S. 42 (1982) [Petition at 17], this Court held that Fields' responses to post-polygraph test

questioning were not inadmissible on the argument that his Fifth Amendment right to the presence of counsel was violated because he was not re-informed of his right to counsel prior to post-test questioning. Id. at 45-49. However, Wyrick v. Fields is distinct from Mrs. Roman's case on several significant grounds.

First, as this Court stressed, Fields himself requested the polygraph examination after consultation with his civilian and military counsel. Id. at 44. Thus, unlike the instant case, Fields and his counsel "initiated [the] interrogation." Id. at 47 (emphasis added).

Second, Fields was a suspect ab initio, who had already been arrested at the time of the polygraph test. Id. at 43. Unlike Mrs. Roman, Fields did not completely change status from a complainant at the time of the Miranda warnings to a suspect at the time of the post-test questioning.

Third, the Miranda warnings given to Fields, unlike the defective warnings given to Mrs. Roman, stated that "anything you say or do can be used against you in a criminal trial." Id. at 44 (emphasis added). Thus, Fields, unlike Mrs. Roman, knew that his responses to questions could be used against him as a defendant.

Fourth, Fields was correctly informed prior to the polygraph test that he "could request at any time that his lawyer join him." Id. at 47-48 (emphasis added). In sharp contrast, Mrs. Roman was informed: "You have a right to have an attorney present while I talk to you, however, the attorney will not be in the room while the polygraph examination is being conducted . . . Do you

want an attorney now?" [Petition, Appendix G at 80] Cf. Miranda v. Arizona, 384 U.S. at 469 ("the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege") (emphasis added).

Fifth, in Mrs. Roman's case, the Miranda warnings were affirmatively misleading. The warnings, by their own language, related solely and exclusively to the polygraph examination and the announcement of the results. One of the forms was even entitled: "WARNING PERSONS TAKING A POLYGRAPH EXAMINATION OF THEIR CONSTITUTIONAL RIGHTS." [Petition, Appendix G at 80] In Wyrick v. Fields, by contrast, this Court's opinion gave no indication that Fields' Miranda warnings had been limited to the polygraph examination itself instead of given as warnings of general applicability. The verbatim recitation of Fields' Miranda warnings in the dissent to the lower court opinion shows that they were not limited, like Mrs. Roman's warnings, to the polygraph examination itself. See Wyrick v. Fields, 682 F.2d 154, 162 (8th Cir. 1982) (Ross, J., dissenting).

In Colorado v. Spring, 479 U.S. 564 (1987) [Petition at 16-17], Spring was arrested on a firearms charge and given his Miranda warnings. Id. at 566-67. He was questioned on the firearms offense and then questioned about a murder. Id. at 567. He admitted that he had shot a man, but denied committing the shooting in question. Id. Spring was later given new Miranda warnings and questioned by different officers, after being specifically informed that he would be questioned about the murder.

Id. He then confessed that he committed the murder. Id. This Court held that Spring's first statement was admissible even though he was not informed that he would be questioned about the murder, since to validly waive his Miranda rights a suspect does not have to have an "awareness of all the possible subjects of questioning in advance of interrogation." Id. at 577.

Colorado v. Spring is thoroughly distinguishable from Mrs. Roman's case. First, although in the initial interview Spring was not specifically told that he would be questioned about the murder, he was not affirmatively misled about the nature of the questioning. This Court made clear that in "this case, we are not confronted with an affirmative misrepresentation by law enforcement officials as to the scope of the interrogation . . . ." Id. at 576 n.8. In Mrs. Roman's case, as reviewed supra, Detective Paekukui fully intended to question Mrs. Roman about false reporting in the likely event that the test showed deception, yet the Miranda waiver forms he gave Mrs. Roman affirmatively misled her into believing that he only intended to conduct the polygraph test and announce the results.

Second, Spring was already arrested at the time of his initial questioning, id. at 566, and thus was fully alerted to the fact that he was being questioned for purposes of prosecution. Mrs. Roman signed her Miranda rights waiver while she was still a complainant, but she had become a suspect when she was questioned after the polygraph test.

Third, Spring was given "the critical advice that

whatever he chooses to say may be used as evidence against him." Id. at 574 (emphasis added). This Court emphasized that its "holding in Miranda specifically required that the police inform a criminal suspect that . . . anything he says may be used against him," id. at 577, and found "no doubt" that "Spring understood . . . that anything he said could be used as evidence against him." Id. at 574. In Mrs. Roman's case, the defective Miranda warnings did not inform her of this "critical advice."

Thus, in Colorado v. Spring, "the additional information could affect only the wisdom of a Miranda waiver, not its essentially voluntary and knowing nature." Id. at 577. In Mrs. Roman's case, by contrast, Petitioner's misconduct prevented the knowing and intelligent waiver itself.

In Duckworth v. Eagen, 492 U.S. -- , 106 L.Ed.2d 166 (1989) [Petition at 16, 18], the sole issue was whether a Miranda warning was defective because it stated that Eagen could obtain an appointed lawyer "if and when you go to court." 106 L.Ed.2d at 175. This Court found 1) that such language accurately described the procedure for appointment of counsel and 2) simply anticipated the commonplace question asked by suspects, about when they could obtain counsel. Id. at 177-78.

Mrs. Roman's case is completely distinguishable from Duckworth v. Eagen. First, at the time of the initial Miranda warning, Eagen knew that he had already been identified by the victim as the person who stabbed her. Id. at 173. Thus, unlike Mrs. Roman, he knew from the beginning that he was being questioned

as a criminal suspect.

Second, the Miranda warning given to Eagen specifically informed him that anything he said "can be used against you in court." Id. at 174 (emphasis added). Thus Eagen, unlike Mrs. Roman, clearly knew that his responses to questions could be used against him as a defendant.

Third, Eagen was informed that he had the right to have a lawyer with him during questioning. Id. Mrs. Roman was informed that an attorney could not be with her during the polygraph examination. [Petition, Appendix G at 80] In sum, Eagen's warnings "touched all of the bases required by Miranda," id. at 177, while those in Mrs. Roman's case did not.[6]

CONCLUSION

For the foregoing reasons and authorities, the petition for a writ of certiorari should be denied. The petition was filed late in clear violation of Supreme Court Rule 20.1; the Hawaii Supreme Court's ruling was supported by an independent and adequate state constitutional ground; Mrs. Roman was subjected to custodial questioning prior to her formal arrest; and Mrs. Roman was not

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[6] Petitioner argues that because "the Supreme Court of Hawaii did not have the benefit of Duckworth v. Eagen at the time that it ruled and because Duckworth was handed down long after the time in which to petition for rehearing expired," this Court may wish to remand Mrs. Roman's case to the Hawaii Supreme Court "for further consideration in light of the precepts stated recently in Duckworth v. Eagen." [Petition at 21] In view of the fact that Duckworth v. Eagen has no practical relevance to Mrs. Roman's case, Respondent urges that such a remand would be a waste of the time and resources of this Court, the Hawaii Supreme Court, and the litigants.

given adequate Miranda warnings for the post-polygraph test questioning.

DATED: Honolulu, Hawaii, October 2, 1989.

PETER C. WOLFF, JR.
Counsel for Respondent

CERTIFICATE OF SERVICE AND
AFFIDAVIT OF PETER C. WOLFF, JR.

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

PETER C. WOLFF, JR., being first duly sworn on oath, deposes and says that:

1. I am counsel for Respondent HAILA DIANE ROMAN in the above-entitled case, and a member in good standing of the bar of this Court. I entered my appearance in the above-entitled case in this Court on July 27, 1989.

2. On October 2, 1989, I caused to be hand-delivered a copy of the accompanying Response to Petition for a Writ of Certiorari, a Motion for Leave to Proceed In Forma Pauperis and an Affidavit in Support of Motion for Leave to Proceed In Forma Pauperis to the following parties:

KEITH M. KANESHIRO
Prosecuting Attorney
City and County of Honolulu
WALLACE W. WEATHERWAX
Deputy Prosecuting Attorney
1164 Bishop Street
Honolulu, Hawaii 96813

WARREN PRICE, III
Attorney General
STEVEN S. MICHAELS
Deputy Attorney General
State Capitol
Honolulu, Hawaii 96813

3. On October 2, 1989, I caused to be deposited in a United States Post Office, with first-class postage prepaid, an original and 3 copies of the accompanying Response to Petition for

a Writ of Certiorari, a Motion for Leave to Proceed In Forma Pauperis and an Affidavit in Support of Motion for Leave to Proceed In Forma Pauperis properly addressed to the Clerk of this Court.

FURTHER AFFIANT SAYETH NAUGHT.

Dated: Honolulu, Hawaii, October 2, 1989.

Peter C. Wolff, Jr.
PETER C. WOLFF, JR.

Subscribed and sworn to before me
this 2nd day of October, 1989.

Notary Public, State of Hawaii

My commission expires: 9/17/93